

# EXPOSURE DRAFT

2004-2005-2006-2007

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT (22/12/2006)
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## **Insurance Contracts Amendment Bill 2007**

**No.     , 2007**

*(Treasury)*

**A Bill for an Act to amend the *Insurance Contracts Act 1984*, and for related purposes**



# EXPOSURE DRAFT

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# EXPOSURE DRAFT

1     **A Bill for an Act to amend the *Insurance Contracts***  
2     ***Act 1984, and for related purposes***

3     The Parliament of Australia enacts:

4     **1 Short title**

5                     This Act may be cited as the *Insurance Contracts Amendment Act*  
6                     2007.

7     **2 Commencement**

8             (1) Each provision of this Act specified in column 1 of the table  
9             commences, or is taken to have commenced, in accordance with  
10            column 2 of the table. Any other statement in column 2 has effect  
11            according to its terms.  
12

# EXPOSURE DRAFT

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	
2. Schedule 1, Parts 1, 2 and 3	The day on which this Act receives the Royal Assent	
3. Schedule 1, Part 4	On the day after the end of the period of 12 months beginning on the day on which this Act receives the Royal Assent	
4. Schedule 1, Part 5	On the day after the end of the period of 6 months beginning on the day on which this Act receives the Royal Assent	
5. Schedule 2	On the day after the end of the period of 6 months beginning on the day on which this Act receives the Royal Assent	
6. Schedule 3	The day on which this Act receives the Royal Assent	
7. Schedule 4	On the day after the end of the period of 12 months beginning on the day on which this Act receives the Royal Assent	
8. Schedule 5	On the day after the end of the period of 2 years beginning on the day on which this Act receives the Royal Assent	
9. Schedule 6	The day on which this Act receives the Royal Assent	
10. Schedule 7, Part 1	The day on which this Act receives the Royal Assent	
11. Schedule 7, Part 2	On the day after the end of the period of 12 months beginning on the day on which this Act receives the Royal Assent	
12. Schedule 7, Part 3	The day on which this Act receives the Royal Assent	
13. Schedule 8, Part 1	On the day after the end of the period of 12 months beginning on the day on which this Act receives the Royal Assent	

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# EXPOSURE DRAFT

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**Commencement information**

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<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
14. Schedule 8, Part 2	On the day after the end of the period of 6 months beginning on the day on which this Act receives the Royal Assent	
15. Schedule 9	On the day after the end of the period of 12 months beginning on the day on which this Act receives the Royal Assent	
16. Schedule 10	On the day after the end of the period of 6 months beginning on the day on which this Act receives the Royal Assent	
17. Schedule 11	The 28th day after the day on which this Act receives the Royal Assent.	

1 Note: This table relates only to the provisions of this Act as originally  
2 passed by both Houses of the Parliament and assented to. It will not be  
3 expanded to deal with provisions inserted in this Act after assent.

4 (2) Column 3 of the table is for additional information that is not part  
5 of this Act. This information may be included in any published  
6 version of this Act.

### 3 Schedule(s)

8 Each Act that is specified in a Schedule to this Act is amended or  
9 repealed as set out in the applicable items in the Schedule  
10 concerned, and any other item in a Schedule to this Act has effect  
11 according to its terms.

# EXPOSURE DRAFT

Schedule 1 Scope and application

Part 1 Duty of utmost good faith

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1

## Schedule 1—Scope and application

2

### Part 1—Duty of utmost good faith

3

4 *[Report recommendations 1.2 and 10.1]*

#### *Insurance Contracts Act 1984*

##### **1 Section 13**

7

Before “A contract”, insert “(1)”.

##### **2 At the end of section 13**

9

Add:

10

(2) A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this Act.

11

12

13

(3) A reference in this section to a party to a contract of insurance includes a reference to a third party beneficiary under the contract.

14

15

(4) This section applies in relation to a third party beneficiary under a contract of insurance only after the contract is entered into.

16

##### **3 Application of items 1 and 2**

17

18

The amendments made by items 1 and 2 apply to a contract of insurance entered into after the commencement of this item.

19

# EXPOSURE DRAFT

Scope and application **Schedule 1**  
“Bundled” workers’ compensation contracts **Part 2**

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1

2 **Part 2—“Bundled” workers’ compensation contracts**

3 *[Report recommendation 1.3]*

4 ***Insurance Contracts Act 1984***

5 **4 At the end of subsection 9(1)**

6 Add:

7 ; or (f) entered into or proposed to be entered into:

8 (i) for the purposes of a law (including a law of a State or a  
9 Territory) that relates to workers’ compensation; and

10 (ii) to provide insurance cover in respect of an employer’s  
11 liability under a rule of the common law that requires  
12 payment of damages to a person for employment-related  
13 personal injury.

14 **5 Application of item 4**

15 The amendment made by item 4 applies to a contract of insurance  
16 entered into after the commencement of this item.

# EXPOSURE DRAFT

Schedule 1 Scope and application

Part 3 “Bundled” contracts generally

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1

## 2 **Part 3—“Bundled” contracts generally**

3 *[Report recommendation 1.4]*

### 4 ***Insurance Contracts Act 1984***

#### 5 **6 After subsection 9(1)**

6 Insert:

7 (1A) If a contract of insurance, or a proposed contract of insurance,  
8 includes:

9 (a) provisions (the *first group of provisions*) that would, if they  
10 comprised a single contract or proposed contract, form a  
11 contract to which any of paragraphs (1)(a) to (f) applies; and

12 (b) provisions (the *second group of provisions*) that would, if  
13 they comprised a single contract or proposed contract, form a  
14 contract to which none of paragraphs (1)(a) to (f) applies;

15 subsection (1) applies as if the first group of provisions and the  
16 second group of provisions were each a separate contract or  
17 proposed contract.

18 (1B) If:

19 (a) a provision of a contract of insurance, or a proposed contract  
20 of insurance, affects the operation of a group of provisions  
21 included in the contract or proposed contract; and

22 (b) because of subsection (1A), subsection (1) applies as if that  
23 group of provisions were a separate contract or proposed  
24 contract;

25 the first-mentioned provision is, for the purposes of subsection (1),  
26 to be regarded as a provision included in that separate contract or  
27 proposed contract.

#### 28 **7 Application of item 6**

29 The amendment made by item 6 applies to a contract of insurance,  
30 whether entered into before or after the commencement of this item.

# EXPOSURE DRAFT

Scope and application **Schedule 1**  
Exclusions from the Marine Insurance Act 1909 **Part 4**

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1

2 **Part 4—Exclusions from the Marine Insurance Act**  
3 **1909**

4 *[Report recommendation 1.5]*

5 ***Insurance Contracts Act 1984***

6 **8 After subsection 9A(1)**

7 Insert:

8 (1A) The *Marine Insurance Act 1909* does not apply to a contract of  
9 marine insurance made in respect of the transportation by water of  
10 property that is used, or intended to be used, wholly or  
11 predominantly for personal, domestic or household purposes by:

12 (a) the insured; or

13 (b) a relative of the insured; or

14 (c) any person with whom the insured resides.

15 Note: The heading to section 9A is replaced by the heading “**Exclusions from the *Marine***  
16 ***Insurance Act 1909*”.**

17 **9 Application of item 8**

18 The amendment made by item 8 applies to a contract of marine  
19 insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

Schedule 1 Scope and application

Part 5 Application of Act: contracts with foreign insurers

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1

2 **Part 5—Application of Act: contracts with foreign**  
3 **insurers**

4 *[Report recommendation 1.6]*

5 ***Insurance Contracts Act 1984***

6 **10 After subsection 8(1)**

7 Insert:

8 (1A) Subject to section 9, the application of this Act extends to contracts  
9 of insurance and proposed contracts of insurance if:

10 (a) either:

11 (i) the contracts are entered into or proposed to be entered  
12 into by a person who is domiciled in a State, or in a  
13 Territory in which this Act applies or to which this Act  
14 extends; or

15 (ii) the contracts provide, or would provide, insurance cover  
16 against the risk of loss or damage occurring in a State,  
17 or in a Territory in which this Act applies or to which  
18 this Act extends; and

19 (b) subsection (1) does not apply to the contracts or proposed  
20 contracts.

21 **11 Subsection 8(2)**

22 Omit “subsection (1)”, substitute “this section”.

23 **12 Application of items 10 and 11**

24 The amendments made by items 10 and 11 apply to a contract of  
25 insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

Electronic communication **Schedule 2**

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1  
2  
3  
**Schedule 2—Electronic communication**

4 *[Report recommendations 2.1 and 2.2]*

5 ***Insurance Contracts Act 1984***

6 **1 Section 72**

7 Repeal the section, substitute:

8 **72 Requirements for notices and other documents**

9 A reference in this Act to the giving of a notice or other document  
10 to a person, in writing, is a reference to giving the person a notice  
11 or other document in writing that complies with the requirements  
12 (if any) prescribed as to:

- 13 (a) the content and legibility of the notice or other document;  
14 and  
15 (b) the material that may accompany the notice or other  
16 document.

17 **2 Subparagraph 77(1)(b)(ii)**

18 Repeal the subparagraph, substitute:

- 19 (ii) by sending the notice or other document to the  
20 appropriate address of the person.

21 **3 After subsection 77(1)**

22 Insert:

23 (1A) For the purposes of subparagraph (1)(b)(ii), the appropriate address  
24 of a natural person is:

- 25 (a) an address (including an electronic address) nominated in  
26 writing by that person to the person giving the notice or other  
27 document; or  
28 (b) if no address is nominated, the postal address of that person  
29 last known to the person giving the notice or other document.

30 (1B) If a natural person nominates an address under paragraph (1A)(a),  
31 that person may, by notice in writing to the person giving the

# EXPOSURE DRAFT

## Schedule 2 Electronic communication

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1 notice or other document, change the nominated address or cancel  
2 the nomination.

3 (1C) Without affecting the operation of the *Electronic Transactions Act*  
4 *1999*, a notice or other document that is to be given by electronic  
5 communication must, as far as practicable, be presented in a way  
6 that will allow the person to whom it is given to keep a copy of it  
7 so that the person can have ready access to it in the future.

8 (1D) The regulations may make provision for or in relation to:  
9 (a) the electronic retention of notices or other documents that  
10 have been given by electronic communication under this Act;  
11 and  
12 (b) electronic access to those notices or other documents by the  
13 person to whom they were given.

14 (1E) The regulations may provide that a specified notice or other  
15 document that is by this Act required or permitted to be given must  
16 be given in hard copy form.

17 Note: A notice or other document that is specified by a regulation made for  
18 the purposes of subsection (1E) may also be given by electronic  
19 communication.

### 20 **4 Application of items 1, 2 and 3**

21 The amendments made by items 1, 2 and 3 apply to a contract of  
22 insurance entered into after the commencement of this item.



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## Schedule 3—Powers of ASIC

*[Report recommendation 3.1]*

### ***Insurance Contracts Act 1984***

#### **1 At the end of Part IA**

Add:

##### **11F ASIC’s power to intervene in proceedings**

- (1) ASIC may intervene in any proceeding relating to a matter arising under this Act.
- (2) If ASIC intervenes in a proceeding, ASIC is taken to be a party to the proceeding and, subject to this Act, has all the rights, duties and liabilities of such a party.
- (3) Without limiting subsection (2), ASIC may appear and be represented in a proceeding in which it intervenes:
  - (a) by a staff member of ASIC; or
  - (b) by a natural person or body to whom ASIC has delegated its functions and powers under this Act; or
  - (c) by a solicitor or by counsel.

#### **2 Application of item 1**

The amendment made by item 1 applies to a proceeding commenced after the commencement of this item.

# EXPOSURE DRAFT

Schedule 4 Disclosure and misrepresentations

Part 1 Insured's duty of disclosure

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1

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## Schedule 4—Disclosure and misrepresentations

3

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### Part 1—Insured's duty of disclosure

5

*[Report recommendation 4.1]*

6

### *Insurance Contracts Act 1984*

7

#### **1 Paragraph 21(1)(b)**

8

Repeal the paragraph, substitute:

9

(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant, having regard to factors including, but not limited to:

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- (i) the nature and extent of the insurance cover to be provided under the relevant contract of insurance; and
- (ii) the class of persons for whom that kind of insurance cover is provided in the ordinary course of the insurer's business; and
- (iii) the circumstances in which the relevant contract of insurance is entered into, including the nature and extent of any questions asked by the insurer.

20

#### **2 Application of item 1**

21

The amendment made by item 1 applies to a contract of insurance, whether entered into before or after the commencement of this item.

22

# EXPOSURE DRAFT

Disclosure and misrepresentations **Schedule 4**  
Eligible contracts of insurance **Part 2**

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1

2 **Part 2—Eligible contracts of insurance**

3 *Insurance Contracts Act 1984*

4 *[Report recommendation 4.2]*

5 **3 Section 21A**

6 Repeal the section, substitute:

7 **21A Eligible contracts of insurance—disclosure of specified matters**

8 (1) This section applies to an eligible contract of insurance.

9 *Position of the insurer*

10 (2) The insurer is taken to have waived compliance with the duty of  
11 disclosure in relation to the contract unless, before the contract is  
12 entered into, the insurer requests the insured to answer one or more  
13 specific questions that are relevant to the decision of the insurer  
14 whether to accept the risk and, if so, on what terms.

15 (3) If:

- 16 (a) in accordance with subsection (2), the insurer requests the  
17 insured to answer one or more specific questions; and  
18 (b) the insurer asks the insured to disclose to the insurer any  
19 other matters that would be covered by the duty of disclosure  
20 in relation to the contract;

21 the insurer is taken to have waived compliance with the duty of  
22 disclosure in relation to those matters.

23 *Position of the insured*

24 (4) If:

- 25 (a) in accordance with subsection (2), the insurer requests the  
26 insured to answer one or more specific questions; and  
27 (b) in answer to each specific question, the insured discloses  
28 each matter that:  
29 (i) is known to the insured; and

# EXPOSURE DRAFT

## Schedule 4 Disclosure and misrepresentations

### Part 2 Eligible contracts of insurance

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1 (ii) a reasonable person in the circumstances could be  
2 expected to have disclosed in answer to that question;  
3 the insured is taken to have complied with the duty of disclosure in  
4 relation to the contract.

#### 5 *Definition*

6 (5) In this section:

7 *eligible contract of insurance* means a contract of insurance that is  
8 specified in the regulations.

#### 9 **4 Application of item 3**

10 The amendment made by item 3 applies to a contract of insurance  
11 entered into after the commencement of this item.

# EXPOSURE DRAFT

Disclosure and misrepresentations **Schedule 4**  
Insurer's duty to inform of duty of disclosure **Part 3**

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1

## 2 **Part 3—Insurer's duty to inform of duty of disclosure**

### 3 *Insurance Contracts Act 1984*

4 *[Report recommendations 4.3 and 4.5]*

#### 5 **5 Section 22**

6 Repeal the section, substitute:

#### 7 **22 Insurer to inform of duty of disclosure**

- 8 (1) The insurer must, before a contract of insurance is entered into,  
9 clearly inform the insured in writing:
- 10 (a) of the general nature and effect of the duty of disclosure; and  
11 (b) if the contract is a contract of life insurance—of the effect of  
12 section @31A; and  
13 (c) if the contract is an eligible contract of insurance within the  
14 meaning of section 21A—of the general nature and effect of  
15 that section; and  
16 (d) that the duty of disclosure applies from the date the  
17 information is received by the insured until the proposed  
18 contract is entered into.
- 19 (2) If the proposed contract is a contract of life insurance, the insurer  
20 must also, before the contract is entered into, clearly inform any  
21 person (other than the insured) who, under the contract, would  
22 become a life insured of the matters referred to in  
23 paragraphs (1)(a), (b) and (d).
- 24 (3) If:
- 25 (a) an insurer complies with subsection (1) in relation to a  
26 proposed contract of insurance; and  
27 (b) the insurer accepts an offer by the insured to enter into the  
28 proposed contract or makes a counter-offer to enter into  
29 another contract of insurance with the insured; and  
30 (c) the insurer's acceptance or counter-offer is made more than 2  
31 months after the insured's most recent disclosure for the  
32 purpose of complying with the duty of disclosure in relation  
33 to the proposed contract;

# EXPOSURE DRAFT

## Schedule 4 Disclosure and misrepresentations

### Part 3 Insurer's duty to inform of duty of disclosure

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- 1 the insurer must give to the insured, with the acceptance or  
2 counter-offer, a reminder notice stating that the duty of disclosure  
3 applies until the proposed or other contract is entered into.
- 4 (4) If the regulations prescribe a form of writing to be used:  
5 (a) for informing a person of the matters referred to in  
6 subsection (1); or  
7 (b) for the reminder notice referred to in subsection (3);  
8 the writing to be used may be in accordance with the form so  
9 prescribed.
- 10 (5) An insurer who has not complied with:  
11 (a) subsection (1); or  
12 (b) if applicable, subsection (2); or  
13 (c) if applicable, subsection (3);  
14 may not exercise a right in respect of a failure to comply with the  
15 duty of disclosure unless that failure was fraudulent.

## 16 **8 Application of item 5**

- 17 The amendment made by item 5 applies to a contract of insurance  
18 entered into after the commencement of this item.

# EXPOSURE DRAFT

Disclosure and misrepresentations **Schedule 4**  
Non-disclosure by life insured **Part 4**

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1

2 **Part 4—Non-disclosure by life insured**

3 *Insurance Contracts Act 1984*

4 *[Report recommendation 4.4]*

5 **9 After section 31**

6 Insert:

7 **@31A Non-disclosure by life insured**

8 If:

- 9 (a) during the negotiations for a contract of life insurance but  
10 before it was entered into, a person (other than the insured)  
11 who would become a life insured under the contract failed to  
12 disclose a matter to the insurer; and  
13 (b) the matter was of a kind that the insured would have been  
14 required to disclose to the insurer to comply with the duty of  
15 disclosure;  
16 this Act has effect as if the failure to disclose the matter had been a  
17 failure by the insured to comply with the duty of disclosure.

18 **10 Application of item 9**

19 The amendment made by item 9 applies to a contract of life insurance  
20 entered into after the commencement of this item.

# EXPOSURE DRAFT

## Schedule 5 Non-standard provisions

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2  
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## Schedule 5—Non-standard provisions

4

### *Insurance Contracts Act 1984*

5

*[Report recommendation 5.1]*

6

#### **1 Subsection 35(2)**

7

Omit “clearly”.

8

#### **2 After subsection 35(2)**

9

Insert:

10

(2A) An insurer may not rely on subsection (2) on the basis that the insurer informed the insured in writing of the effect of the proposed contract (as referred to in paragraph (a) or (b) of that subsection) unless the information in the document or other writing provided to the insured by the insurer was worded and presented in a clear, concise and effective manner.

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#### **3 Section 37**

17

Before “An insurer”, insert “(1)”.

18

#### **4 Section 37**

19

Omit “An insurer”, substitute “Subject to subsection (2), an insurer”.

20

#### **5 Section 37**

21

Omit “clearly”.

22

#### **6 At the end of section 37**

23

(2) An insurer may not rely on a provision included in a contract of insurance of a kind referred to in subsection (1) on the basis that the insurer informed the insured in writing of the effect of the provision unless the information in the document or other writing provided to the insured by the insurer was worded and presented in a clear, concise and effective manner.

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#### **7 Application of items 1 to 6**

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# EXPOSURE DRAFT

Non-standard provisions **Schedule 5**

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1           The amendments made by items 1 to 6 apply to a contract of insurance  
2           entered into after the commencement of this item.

# EXPOSURE DRAFT

## Schedule 6 Remedies of the parties

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### **Schedule 6—Remedies of the parties**

4

#### ***Insurance Contracts Act 1984***

5

*[Report recommendation 6.1]*

6

#### **1 Subsection 14(1)**

7

After “the contract”, insert “, or a provision of this Act,”.

8

#### **2 Application of item 1**

9  
10

The amendment made by item 1 applies to a contract of insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

Remedies of insurer: life insurance contracts **Schedule 7**  
“Unbundling” of contracts **Part 1**

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1  
2 **Schedule 7—Remedies of insurer: life**  
3 **insurance contracts**

4 **Part 1—“Unbundling” of contracts**

5 *Insurance Contracts Act 1984*

6 *[Report recommendation 7.1]*

7 **1 Before section 28**

8 Insert:

9 **@27A Application of Division to contracts of life insurance that**  
10 **provide 2 or more kinds of insurance cover**

11 If a contract of life insurance provides 2 or more kinds of insurance  
12 cover, this Division applies, in relation to each of those kinds of  
13 insurance cover, as if the contract provided only that kind of  
14 insurance cover.

15 Note: Because of this section, the remedies that may be available to an  
16 insurer under this Division in relation to a contract of life insurance  
17 will depend on the kind of insurance cover provided by the contract.

18 **2 Application of item 1**

19 The amendment made by item 1 applies to a contract of insurance  
20 entered into after the commencement of this item.

# EXPOSURE DRAFT

Schedule 7 Remedies of insurer: life insurance contracts

Part 2 Remedies for non-disclosure and misrepresentation

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1

2 **Part 2—Remedies for non-disclosure and**  
3 **misrepresentation**

4 ***Insurance Contracts Act 1984***

5 *[Report recommendations 7.2 and 7.3]*

6 **3 After section 28**

7 Insert:

8 **@28A Contracts of life insurance that do not provide cover on death**  
9 **or have a surrender value**

- 10 (1) This section applies if the person who became the insured under a  
11 contract of life insurance upon the contract being entered into:  
12 (a) failed to comply with the duty of disclosure; or  
13 (b) made a misrepresentation to the insurer before the contract  
14 was entered into;  
15 but does not apply if the insurer would have entered into the  
16 contract, for the same premium and on the same terms and  
17 conditions, even if the insured had not failed to comply with the  
18 duty of disclosure or had not made the misrepresentation before the  
19 contract was entered into.
- 20 (2) This section does not apply if the contract is a contract of life  
21 insurance within the meaning of section 29.
- 22 (3) If the failure was fraudulent or the misrepresentation was made  
23 fraudulently, the insurer may avoid the contract.
- 24 (4) If the insurer is not entitled to avoid the contract or, being entitled  
25 to avoid the contract (whether under subsection (3) or otherwise)  
26 has not done so, the liability of the insurer in respect of a claim is  
27 reduced to the amount that would place the insurer in a position in  
28 which the insurer would have been if the failure had not occurred  
29 or the misrepresentation had not been made.

30 **4 Before subsection 29(1)**

31 Insert:

---

# EXPOSURE DRAFT

Remedies of insurer: life insurance contracts **Schedule 7**  
Remedies for non-disclosure and misrepresentation **Part 2**

---

1 (1A) In this section:

2 *contract of life insurance* means:

3 (a) a contract of life insurance the primary purpose of which is to  
4 provide insurance cover in respect of the death of a life  
5 insured; or

6 (b) a contract of life insurance that has a surrender value.

7 Note: The heading to section 29 is replaced by the heading “**Contracts of life insurance that**  
8 **provide cover on death or have a surrender value**”.

9 **5 Subsection 29(3)**

10 Omit “a contract”, insert “the contract”.

11 **6 Application of items 3 to 5**

12 The amendments made by items 3 to 5 apply to a contract of insurance  
13 entered into after the commencement of this item.

# EXPOSURE DRAFT

Schedule 7 Remedies of insurer: life insurance contracts

Part 3 Remedy for misstatement of date of birth

---

1

## 2 **Part 3—Remedy for misstatement of date of birth**

### 3 *Insurance Contracts Act 1984*

4 *[Report recommendation 7.5]*

#### 5 **7 After subsection 30(3)**

6 Insert:

7 (3A) If:

8 (a) the expiration date of a contract of life insurance is calculated  
9 by reference to the date of birth of a person who is a life  
10 insured under the contract; and

11 (b) the person's date of birth was not correctly stated to the  
12 insurer at the time when the contract was entered into;  
13 the insurer may (instead of doing any of the things referred to in  
14 subsection (2)) vary the contract by changing its expiration date to  
15 the date that would have been the expiration date if the contract  
16 had been based on the correct date of birth.

#### 17 **8 Subsection 30(4)**

18 After "subsection (2)", insert "or (3A)".

#### 19 **9 Application of items 7 and 8**

20 The amendments made by items 7 and 8 apply to a contract of life  
21 insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

Restrictions on insurers' contractual rights and remedies **Schedule 8**  
Relief for innocent non-disclosure or misrepresentation **Part 1**

---

1  
2 **Schedule 8—Restrictions on insurers’**  
3 **contractual rights and remedies**

4 **Part 1—Relief for innocent non-disclosure or**  
5 **misrepresentation**

6 *[Report recommendation 8.2]*

7 ***Insurance Contracts Act 1984***

8 **1 Subsection 31(1)**

9 Repeal the subsection, substitute:

- 10 (1) This section applies to a proceeding by the insured in respect of a  
11 contract of insurance if:
- 12 (a) the insurer has avoided the contract on the ground of a  
13 fraudulent failure to comply with the duty of disclosure or a  
14 fraudulent misrepresentation; or
  - 15 (b) the liability of the insurer in respect of the loss that is the  
16 subject of the proceeding has been significantly reduced  
17 (including being reduced to nil), under subsection 28(3) or  
18 @28A(4), on the ground of a failure to comply with the duty  
19 of disclosure or a misrepresentation.

20 Note: The heading to section 31 is altered by inserting “**or reduction of liability**” after  
21 “**avoidance**”.

22 (1A) Subject to this section:

- 23 (a) the court may, if it would be harsh and unfair not to do so,  
24 disregard the avoidance or reduction of liability; and
- 25 (b) if it does so, the court must allow the insured to recover the  
26 whole, or such part as the court thinks just and equitable in  
27 the circumstances, of the amount that would have been  
28 payable if the contract had not been avoided or the insurer’s  
29 liability had not been reduced.

30 **2 Subsection 31(2)**

31 Omit “subsection (1)”, substitute “subsection (1A)”.

32 **3 Subsection 31(3)**

---

# EXPOSURE DRAFT

**Schedule 8** Restrictions on insurers' contractual rights and remedies

**Part 1** Relief for innocent non-disclosure or misrepresentation

---

1 Omit "subsection (1)", substitute "subsection (1A)".

2 **4 Paragraph 31(3)(a)**

3 Omit "shall", substitute "must, if applicable,".

4 **5 Paragraph 31(3)(b)**

5 Repeal the paragraph, substitute:

6 (b) must weigh the extent of the culpability of the insured in  
7 relation to the failure or misrepresentation against the  
8 magnitude of the loss that would be suffered by the insured if  
9 the avoidance or reduction of liability were not disregarded;

10 **6 Subsection 31(4)**

11 Omit "subsection (1)", substitute "subsection (1A)".

12 **7 Subsection 31(4)**

13 After "avoidance", insert "or reduction of liability".

14 **8 Application of items 1 to 7**

15 The amendments made by items 1 to 7 apply to a contract of insurance  
16 entered into after the commencement of this item.



# EXPOSURE DRAFT

Restrictions on insurers' contractual rights and remedies **Schedule 8**  
Expiration and renewal of contracts **Part 2**

---

1

## 2 **Part 2—Expiration and renewal of contracts**

3 *[Report recommendation 8.3]*

### 4 ***Insurance Contracts Act 1984***

#### 5 **9 Paragraph 58(4)(b)**

6 Repeal the paragraph, substitute:

7 (b) if a claim is made under the contract, there is payable by the  
8 insured to the insurer, as a premium in respect of the contract,  
9 an amount equal to the amount that, if the original contract  
10 had been renewed for the same period and on the same terms  
11 and conditions, would have been payable by the insured in  
12 respect of the renewal.

#### 13 **10 Subsections 58(5) and (6)**

14 Repeal the subsections.

#### 15 **11 Application of items 9 and 10**

16 The amendments made by items 9 and 10 apply to a contract of  
17 insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

Schedule 9 Third parties

Part 1 Definition of third party beneficiary

---

1

## Schedule 9—Third parties

2

3

### Part 1—Definition of third party beneficiary

4

#### *Insurance Contracts Act 1984*

5

##### 1 Subsection 11(1)

6

Insert:

7

*third party beneficiary*, under a contract of insurance, means a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends.

8

9

10

11

##### 2 Application of item 1

12

The amendment made by item 1 applies to a contract of insurance entered into after the commencement of this item.

13

# EXPOSURE DRAFT

Third parties **Schedule 9**  
Requests by third party beneficiaries to insurers for information **Part 2**

---

1

2 **Part 2—Requests by third party beneficiaries to**  
3 **insurers for information**

4 *[Report recommendation 10.1]*

5 ***Insurance Contracts Act 1984***

6 **3 Subsection 41(1)**

7 Omit “the insured were”, substitute “the insured or any third party  
8 beneficiary were”.

9 **4 Paragraph 41(1)(a)**

10 After “the insured”, insert “or third party beneficiary”.

11 Note: The heading to section 41 is altered by inserting “**or a third party beneficiary**” after  
12 “**insured**”.

13 **5 Subsection 41(2)**

14 Omit all the words from and including “An insured” to and including  
15 “in writing:”, substitute “If the insured or any third party beneficiary  
16 under a contract of liability insurance has made a claim under the  
17 contract, the insured or third party beneficiary may at any time, by  
18 notice in writing given to the insurer, require the insurer to inform the  
19 insured or third party beneficiary in writing:”.

20 **6 Paragraph 41(2)(b)**

21 Repeal the paragraph, substitute:

22 (b) if the insurer so admits, whether the insurer proposes to  
23 conduct, on behalf of the insured or third party beneficiary,  
24 the negotiations and any legal proceedings in respect of the  
25 claim made against the insured or third party beneficiary.

26 **7 Subsection 41(3)**

27 Repeal the subsection, substitute:

28 (3) If the insurer does not, within a reasonable time after the notice  
29 was given, inform the insured or third party beneficiary, as the case  
30 requires:

# EXPOSURE DRAFT

## Schedule 9 Third parties

### Part 2 Requests by third party beneficiaries to insurers for information

---

- 1 (a) that the insurer admits that the contract of liability insurance  
2 applies to the claim; and  
3 (b) that the insurer proposes to conduct, on behalf of the insured  
4 or third party beneficiary, the negotiations and any legal  
5 proceedings in respect of the claim made against the insured  
6 or third party beneficiary;  
7 the insurer may not refuse payment of the claim, and the amount  
8 payable in respect of the claim is not reduced, by reason only that  
9 the insured or third party beneficiary breached the contract as  
10 mentioned in subsection (1).

#### 11 **8 Subsection 74(1)**

12 After “the insured” (first occurring), insert “or any third party  
13 beneficiary”.

#### 14 **9 Subsection 74(1)**

15 After “the insured” (second occurring), insert “or third party  
16 beneficiary”.

#### 17 **10 Subsection 74(2)**

18 After “the insured”, insert “or third party beneficiary, as the case  
19 requires,”.

#### 20 **11 Application of items 3 to 10**

21 The amendments made by items 3 to 10 apply to a contract of insurance  
22 entered into after the commencement of this item.

# EXPOSURE DRAFT

Third parties **Schedule 9**  
Insurer's defences in actions by third party beneficiaries **Part 3**

---

1

2 **Part 3—Insurer's defences in actions by third party**  
3 **beneficiaries**

4 *[Report recommendation 10.2]*

5 ***Insurance Contracts Act 1984***

6 **12 Subsection 48(1)**

7 Repeal the subsection, substitute:

- 8 (1) A third party beneficiary under a contract of general insurance has  
9 a right to recover the amount of the third party beneficiary's loss  
10 from the insurer in accordance with the contract even though the  
11 third party beneficiary is not a party to the contract.

12 Note: The heading to section 48 is replaced by the heading "**Entitlement of third party**  
13 **beneficiaries under contracts of general insurance**".

14 **13 Subsection 48(2)**

15 Omit "a person who has such a right", substitute "the third party  
16 beneficiary".

17 **14 Paragraph 48(2)(a)**

18 Repeal the paragraph, substitute:

- 19 (a) has, in relation to the third party beneficiary's claim, the  
20 same obligations to the insurer as the third party beneficiary  
21 would have if the third party beneficiary were the insured;  
22 and

23 **15 At the end of subsection 48(3)**

24 Add ", including, but not limited to, defences relating to the conduct of  
25 the insured (whether the conduct occurred before or after the contract  
26 was entered into)".

27 **16 Subsection 48AA(1)**

28 Repeal the subsection, substitute:

- 29 (1) This section applies in relation to a contract of life insurance if:  
30 (a) the contract is entered into in connection with an RSA; and

# EXPOSURE DRAFT

## Schedule 9 Third parties

### Part 3 Insurer's defences in actions by third party beneficiaries

---

1 (b) the owner of the policy is an RSA provider.

2 (1A) A third party beneficiary under the contract has a right to recover a  
3 benefit from the insurer in accordance with the contract even  
4 though the third party beneficiary is not a party to the contract.

5 Note: The heading to section 48AA is altered by omitting “another person” and substituting  
6 “a third party beneficiary”.

#### 7 **17 Subsection 48AA(2)**

8 Omit “a person who has such a right”, substitute “the third party  
9 beneficiary”.

#### 10 **18 Paragraph 48AA(2)(a)**

11 Omit “his or her”, substitute “the third party beneficiary’s”.

#### 12 **19 Paragraph 48AA(2)(a)**

13 Omit “he or she” (wherever occurring), substitute “the third party  
14 beneficiary”.

#### 15 **20 Subsection 48AA(3)**

16 Omit “he or she”, substitute “the insurer”.

#### 17 **21 At the end of subsection 48AA(3)**

18 Add “, including, but not limited to, defences relating to the conduct of  
19 the insured (whether the conduct occurred before or after the contract  
20 was entered into)”.

#### 21 **22 Application of items 12 to 21**

22 The amendments made by items 12 to 21 apply to a contract of  
23 insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

1

2

## **Part 4—Rights and obligations of third party beneficiaries under contracts of life insurance**

3

4

5

*[Report recommendation 10.3]*

6

### ***Insurance Contracts Act 1984***

7

#### **23 Subsections 48A(1) and (2)**

8

Repeal the subsections, substitute:

9

(1) The following provisions have effect in relation to a contract of life insurance that is expressed to be for the benefit of a third party beneficiary (who may be the life insured):

10

11

12

13

14

15

16

17

18

19

20

(a) the third party beneficiary has a right to recover from the insurer any money that becomes payable under the contract even though the third party beneficiary is not a party to the contract;

(b) any money that the third party beneficiary recovers under the contract is payable to the third party beneficiary;

(c) if the third party beneficiary is not the life insured, any money paid to the third party beneficiary under the contract does not form part of the estate of the life insured.

21

22

Note: The heading to section 48A is altered by omitting “another person” and substituting “a third party beneficiary”.

23

(2) Subject to the contract, the third party beneficiary:

24

25

26

27

28

29

(a) has, in relation to the third party beneficiary’s claim, the same obligations to the insurer as the third party beneficiary would have if the third party beneficiary were the insured; and

(b) may discharge the insured’s obligations in relation to any money paid to the third party beneficiary under the contract.

30

#### **24 Application of item 23**

31

32

The amendment made by item 23 applies to a contract of life insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

Schedule 9 Third parties

Part 5 Right of third party to recover against insurer

---

1

## 2 **Part 5—Right of third party to recover against insurer**

3 *[Report recommendation 10.4]*

### 4 ***Insurance Contracts Act 1984***

#### 5 **25 Subsection 51(1)**

6 Repeal the subsection, substitute:

7 (1) If:

8 (a) the insured or any third party beneficiary under a contract of  
9 liability insurance is liable in damages to another person; and

10 (b) the contract provides insurance cover in respect of the  
11 liability; and

12 (c) any of the following has happened:

13 (i) the insured or third party beneficiary has died;

14 (ii) the insured or third party beneficiary cannot, after  
15 reasonable inquiry, be found;

16 (iii) the other person has obtained a judgment against the  
17 insured or third party beneficiary in respect of the  
18 liability and the execution or other process issued on the  
19 judgment is returned unsatisfied;

20 the other person may recover from the insurer an amount equal to  
21 the insurer's liability under the contract in respect of the liability of  
22 the insured or third party beneficiary.

23 Note: The heading to section 51 is replaced by the heading "**Claims against insurer in**  
24 **respect of liability of insured or third party beneficiary**".

#### 25 **26 Paragraph 51(2)(b)**

26 Repeal the paragraph, substitute:

27 (b) the liability of the insured or third party beneficiary, or of the  
28 legal personal representative of the insured or third party  
29 beneficiary, to the other person.

#### 30 **27 Subsection 51(3)**

31 Omit "third party has in respect of the insured's liability", substitute  
32 "other person has in respect of the liability of the insured or third party  
33 beneficiary".



# EXPOSURE DRAFT

Third parties **Schedule 9**

Right of third party to recover against insurer **Part 5**

---

1 **28 Application of items 25 to 27**

2           The amendments made by items 25 to 27 apply to a contract of liability  
3           insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

Schedule 9 Third parties

Part 6 Non-disclosure or misrepresentation by member of group life insurance scheme

---

1

2 **Part 6—Non-disclosure or misrepresentation by**  
3 **member of group life insurance scheme**

4 *[Report recommendations 10.5 and 10.6]*

5 ***Insurance Contracts Act 1984***

6 **29 Subsection 4(2)**

7 Omit “blanket superannuation contract”, substitute “superannuation  
8 contract (other than an individual superannuation contract)”.

9 **30 Subsection 11(1)**

10 Insert:

11 *group life contract* means a contract of life insurance that is being  
12 maintained for the purposes of a superannuation, retirement or  
13 other group life scheme.

14 **31 Subsection 11(1) (paragraph (b) of the definition of**  
15 ***proposal form*)**

16 Omit “or retirement”, substitute “, retirement or other group life”.

17 **32 Paragraph 11(4)(b)**

18 Omit “only; and”, substitute “only.”

19 **33 Paragraph 11(4)(c)**

20 Repeal the paragraph.

21 **34 Paragraph 23(a)**

22 Omit “or retirement”, substitute “, retirement or other group life”.

23 **35 Paragraph 26(3)(a)**

24 Omit “or retirement”, substitute “, retirement or other group life”.

25 **36 Section 32**

26 Repeal the section, substitute:

# EXPOSURE DRAFT

Third parties **Schedule 9**

Non-disclosure or misrepresentation by member of group life insurance scheme **Part 6**

---

1     **32 Non-disclosure or misrepresentation by life insured covered**  
2             **under group life contract**

3             (1) This Division extends to the case where there was a failure to  
4                 comply with the duty of disclosure, or a misrepresentation was  
5                 made to the insurer, in respect of a proposed life insured under a  
6                 group life contract, as though:

7                 (a) the insurance cover provided by the group life contract in  
8                     respect of the life insured were provided by an individual  
9                     contract of life insurance between the insurer and the insured;  
10                    and

11                 (b) the group life contract had been entered into at the time when  
12                     the proposed life insured became a life insured under the  
13                     group life contract.

14             (2) For the purposes of this Division, if the failure or misrepresentation  
15                 occurred after the proposed life insured became a member of the  
16                 relevant superannuation, retirement or other group life scheme but  
17                 before the insurance cover was provided by the group life contract  
18                 in respect of the life insured, the failure or misrepresentation is  
19                 taken to have occurred before the proposed life insured became a  
20                 life insured under the group life contract.

21     **37 Section 32A**

22             Omit “made, to the insurer”, substitute “made to the insurer.”.

23     **38 Application of items 29, 32 and 33**

24             The amendments made by items 29, 32 and 33 apply to a contract of  
25             insurance, whether entered into before or after the commencement of  
26             this item.

27     **39 Application of items 30, 31, 34, 35, 36 and 37**

28             The amendments made by items 30, 31, 34, 35, 36 and 37 apply to a  
29             contract of insurance entered into after the commencement of this item.

# EXPOSURE DRAFT

## Schedule 10 Subrogation

---

1

2

3

## Schedule 10—Subrogation

4

*[Report recommendations 11.1 and 11.2]*

5

### *Insurance Contracts Act 1984*

6

#### **1 Before section 65**

7

Insert:

8

#### **64 Application to third party beneficiaries**

9

In this Part, a reference to an insured includes a reference to a third party beneficiary.

10

11

#### **2 Section 67**

12

Repeal the section, substitute:

13

#### **67 Rights with respect to money recovered under subrogation etc.**

14

(1) This section applies if:

15

(a) an insurer is liable to an insured under a contract of general insurance in respect of a loss; and

16

17

(b) the insurer has a right of subrogation in respect of the loss; and

18

19

(c) an amount is recovered (whether by the insurer or the insured) from another person in respect of the loss.

20

21

(2) If the amount is recovered by the insurer in exercising the insurer's right of subrogation in respect of the loss:

22

23

(a) the insurer is entitled under this paragraph to so much of the amount as does not exceed the sum of the following:

24

25

(i) the amount paid by the insurer to the insured in respect of the loss;

26

27

(ii) the amount paid by the insurer for administrative and legal costs incurred in connection with the recovery; and

28

29

(b) if the amount recovered exceeds the amount to which the insurer is entitled under paragraph (a)—the insured is entitled under this paragraph to so much of the excess as does not exceed the insured's overall loss; and

30

31

32

# EXPOSURE DRAFT

- 1 (c) if the amount recovered exceeds the sum of the amounts to  
2 which the insurer and the insured are entitled under  
3 paragraphs (a) and (b)—the insurer is entitled to the excess.
- 4 (3) If the amount is recovered by the insured:
- 5 (a) the insured is entitled under this paragraph to so much of the  
6 amount as does not exceed the sum of the following:
- 7 (i) the insured’s overall loss;
- 8 (ii) the amount paid by the insured for administrative and  
9 legal costs incurred in connection with the recovery; and
- 10 (b) if the amount recovered exceeds the amount to which the  
11 insured is entitled under paragraph (a)—the insurer is entitled  
12 to so much of the excess as does not exceed the amount paid  
13 by the insurer to the insured in respect of the loss; and
- 14 (c) if the amount recovered exceeds the sum of the amounts to  
15 which the insured and the insurer are entitled under  
16 paragraphs (a) and (b)—the insured is entitled to the excess.
- 17 (4) If the amount is recovered by the insurer and the insured jointly:
- 18 (a) the insurer is entitled to the amount referred to in  
19 paragraph (2)(a); and
- 20 (b) the insured is entitled to the amount referred to in  
21 paragraph (3)(a).
- 22 (5) If:
- 23 (a) the amount is recovered by the insurer and the insured  
24 jointly; and
- 25 (b) the amount recovered exceeds, or is less than, the sum of the  
26 amounts to which the insurer and the insured are entitled  
27 under paragraphs (4)(a) and (b);
- 28 the entitlements of the insurer and the insured under those  
29 paragraphs are to be calculated on a pro rata basis in proportion to  
30 the amounts paid by the insurer and the insured for the  
31 administrative and legal costs incurred in connection with the  
32 recovery.
- 33 (6) If an amount by way of interest is awarded in respect of the amount  
34 recovered (the *principal amount*), the following apply:
- 35 (a) if the principal amount was recovered by the insurer, the  
36 insurer is entitled to the amount by way of interest;
-

# EXPOSURE DRAFT

## Schedule 10 Subrogation

---

- 1 (b) if the principal amount was recovered by the insured, the  
2 insured is entitled to the amount by way of interest;
- 3 (c) if the principal amount was recovered by the insurer and the  
4 insured jointly, the amount by way of interest is to be divided  
5 fairly between the insurer and the insured, having regard to:
- 6 (i) the amounts to which the insurer and the insured are  
7 entitled under subsection (4) or (5), as the case requires;  
8 and
- 9 (ii) the periods of time for which the insurer and the insured  
10 have lost the use of their money.

11 (7) The rights of the insurer and the insured under this section are  
12 subject to:

- 13 (a) the relevant contract of insurance; and  
14 (b) any agreement made between the insurer and the insured  
15 after the loss has occurred.

16 (8) In this section:

17 *insured's overall loss*, in relation to a loss incurred by an insured  
18 to which this section applies, means the amount of the loss reduced  
19 by any amount paid to the insured by the insurer in respect of the  
20 loss.

### 21 **3 Application of items 1 and 2**

22 The amendments made by items 1 and 2 apply to a contract of insurance  
23 entered into after the commencement of this item.

# EXPOSURE DRAFT

Claims made and claims made and notified policies **Schedule 11**

---

1  
2 **Schedule 11—Claims made and claims made**  
3 **and notified policies**  
4

5 *Insurance Contracts Act 1984*

6 **1 Subsection 40(1)**

7 Repeal the subsection, substitute:

- 8 (1) This section applies in relation to a contract of liability insurance  
9 the effect of which is:
- 10 (a) that the insurer's liability is excluded or limited if a claim  
11 against the insured or any third party beneficiary in respect of  
12 a loss suffered by some other person is not made before the  
13 insurance cover provided by the contract expires; or
  - 14 (b) that the insurer's liability is excluded or limited if:
    - 15 (i) a claim against the insured or any third party beneficiary  
16 in respect of a loss suffered by some other person is not  
17 made before the insurance cover provided by the  
18 contract expires; or
    - 19 (ii) a claim of that kind is made before the insurance cover  
20 provided by the contract expires, but notice of the claim  
21 is not given to the insurer before the insurance cover  
22 expires.

23 **2 Subsection 40(3)**

24 Repeal the subsection, substitute:

- 25 (3) If:
- 26 (a) the insured or any third party beneficiary under the contract  
27 becomes aware, during the period in which insurance cover is  
28 provided by the contract, of facts that might give rise to a  
29 claim against the insured or third party beneficiary; and
  - 30 (b) the insured or third party beneficiary gives notice in writing  
31 to the insurer of those facts as soon as is reasonably  
32 practicable after becoming aware of them, but not later than  
33 28 days after the insurance cover provided by the contract  
34 expires;

# EXPOSURE DRAFT

## Schedule 11 Claims made and claims made and notified policies

---

1 the insurer is not relieved of liability under the contract in respect  
2 of the claim, when made, only because the claim is made or  
3 notified, as the case requires, after the insurance cover provided by  
4 the contract has expired.

5 (4) The insurer must clearly inform the insured of the effect of failing  
6 to give notice under paragraph (3)(b), in the circumstances  
7 described in paragraph (3)(a), by notice in writing given not later  
8 than 14 days before the insurance cover provided by the contract  
9 expires.

10 (5) If the insured cancels the contract before the insurance cover  
11 provided by the contract expires, the insurer must clearly inform  
12 the insured of the effect of failing to give notice under  
13 paragraph (3)(b), in the circumstances described in  
14 paragraph (3)(a), by notice in writing given as soon as reasonably  
15 practicable, but not later than 14 days after the date on which the  
16 contract was cancelled.

### 17 **3 Subsection 54(1)**

18 After “this section”, insert “and section 54A”.

### 19 **4 After section 54**

20 Insert:

### 21 **54A Exclusion of certain omissions from operation of section 54**

22 (1) This section applies in relation to a contract of liability insurance to  
23 which section 40 applies.

24 (2) Despite subsection 54(1), the insurer may refuse to pay a claim  
25 against the insured or any third party beneficiary under the contract  
26 if:

27 (a) the insured or third party beneficiary became aware, during  
28 the period in which insurance cover was provided by the  
29 contract, of facts that might give rise to such a claim; and

30 (b) the insured or third party beneficiary did not give notice in  
31 writing to the insurer of those facts:

32 (i) during the period in which insurance cover was  
33 provided by the contract; or

34 (ii) within 28 days after that cover had expired.



# EXPOSURE DRAFT

Claims made and claims made and notified policies **Schedule 11**

---

1 (3) The regulations may specify one or more classes of contract of  
2 liability insurance to which this section does not apply.

3 **5 Application of items 1 to 4**

4 The amendments made by items 1 to 4 apply to a contract of liability  
5 insurance entered into after the commencement of this item.